Supreme Court of the United States

OCTOBER TERM, 1940.

No. 524

DEN NORSKE AMERIKALINJE A/S, as claimant of the steamship IDEFJORD, her engines, etc.,

Petitioner,

against

BLUMENTHAL IMPORT CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Summary Statement of the Matters Involved.

Petitioner, Den Norske Amerikalinje A/S, a corporation, respectfully shows:

1. Petitioner asks that this Court review the decision of the Circuit Court of Appeals for the Second Circuit in a cause in admiralty, brought *in rem* against the steamship Idefjord, principally upon the ground that the decision sought to be reviewed,* which reversed that of the District Court, is in conflict with the decision of the Circuit Court of Appeals for the Third Circuit and of decisions of state courts of last resort (*infra,* pp. 5-8, 11-18).

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* Reported below, 114 Fed. (2d) 262, reversing 31 Fed. Supp. 667.

2. The cause was tried in the first instance in the United States District Court, Southern District of New York, which court entered a decree of dismissal (R. p. 294). The District Court made findings of fact (R. p. 294 and pp. 282-288) which were accepted by the Circuit Court of Appeals (R. pp. 306-307). A summary of these findings of fact is:

3. In December, 1936 and January, 1937, Blumenthal Import Corporation (respondent herein and libelant below) contracted to purchase 321 bales of wool from one Zariffa, a wool exporter in Cairo, Egypt. The contracts of sale were on a C. & F basis (R. p. 282).

4. In order to dispatch the bales in question to the United States, Zariffa delivered them to the firm of D. C. Pitellos & Co., at Alexandria, Egypt, which issued five so-called bills of lading, all in the same form, between January 26, 1937 and February 19, 1937 (R. pp. 282, 225-233). These so-called bills of lading provided that the wool would be carried from Alexandria, Egypt, to Port Said and there transshipped "by first available opportunity," subject to all of the terms and conditions in the bills of lading in use by "the on-carrying line of steamers" (R. p. 283), and, further, "subject to the conditions and exceptions of the carrying conveyance." (Next to last paragraph of Libelant's Exhibits E-1 to E-5 reproduced between pages 224 and 233, also the opinion of the Circuit Court of Appeals [R. p. 306].)

5. After the wool had arrived at Port Said, concern developed because of the lack of any ships which could carry the goods forward under deck (R. p. 283), no under-deck space being available on any vessel for several months (R. pp. 60-61).

6. Negotiations then took place between the Port Said and Suez Coal Company, who were agents of the time charterers of the Idefjord, and Stapledon & Sons, in whose

possession the wool was, for the carriage of the wool on the deck of the Idefjord from Port Said to Casablanca, and then under deck for the transatlantic voyage, Stapledon & Sons notifying the Port Said & Suez Coal Co. that they had the shippers' consent for on-deck shipment as far as Casablanca, provided the wool was then stowed below deck (R. p. 284).

Zariffa was notified of the necessity of deck shipment up to Casablanca and on February 27th Zariffa wrote to the Blumenthal Import Corporation that the wool had been loaded on deck "only up to Casablanca * * *. In view of the lack of space on steamers *I found it preferable to ship in this way,* particularly as the 'deck' will only be for part of the Mediterranean, which is a calm sea especially at this period" (R. p. 286). (Italics ours.)

7. On February 27th the wool was loaded upon the Idefjord (R. p. 285). The contract under which the Idefjord received the bales was evidenced by the letters of Stapledon & Sons and Port Said & Suez Coal Co., the ship's manifest, the mate's receipts and the bills of lading made out by the Port Said & Suez Coal Company, all of which provided for shipment "on deck at shippers' risk to Casablanca only where goods must be placed (or restowed) in hold" (R. pp. 284-285).

8. The wool was well and securely stowed on the ship's deck, aft of the bridge, and rested on barrels, and on the hatch, which raised the bottom of the lowest bales a distance of 3 feet or more from the deck itself, the bales being covered with tarpaulins (R. p. 285).

9. Some days after sailing from Port Said, and while proceeding in the Mediterranean bound for Casablanca, the Idefjord encountered excessive rains, heavy seas and westerly gales (R. p. 286), and on arrival at Casablanca on March 12th it was found that the deck cargo had become

to some extent wet from the rain and spray and some of it was heating (R. p. 286). The wool was accordingly left at Casablanca to be reconditioned (R. p. 286).

The District Court held that the determinative factor in the case was whether the master of the Idefjord had the right to accept the goods for "on deck" stowage (R. p. 288). Summarizing the situation at Port Said, the District Court said (R. pp. 288-289):

> "Here the initial carrier [D. C. Pitelkes & Co.] undertook, as is evidenced by the through bill of lading, to deliver the merchandise to its ultimate destination, all parties concerned contemplating that there would be transshipment. We then find Stapledon and Sons in possession of the goods at the point of transshipment with a duty to transship. The captain of the 'Idefjord' and the Port Said and Suez Coal Company informed them of the fact that there was no room below deck on the 'Idefjord'. Stapledon and Sons, the captain of the 'Idefjord' and the Port Said and Suez Coal Company then contracted, as appears clearly from all the papers evidencing the transaction, that the goods would be carried by the 'Idefjord' 'on deck at shippers' risk.' We think, on these facts, the only fair measure of the second carrier's liability is its own contract with Stapledon and Sons."

10. With reference to the contention that the master of the Idefjord should have known that the acceptance of the goods for "on deck" carriage was unreasonable and hence that he should have declined to carry them, the District Court said (R. pp. 292-293):

> "Innumerable factors enter into the reasonableness of such manner of carriage, most of which the captain could not know and should not be required to know. There was an obligation of the shipper to avoid unnecessary delay. There was a fluctuating market. There was the cost and danger of further storage at Port Said. There was the uncertainty of obtaining another ship to carry the wool. Any

> one of these or other easily imagined considerations might well have made their stowage reasonable and advantageous with all its risk. We think, therefore, that the carrier, recognizing the risk, had a right to contract with the person in possession of the goods, irrespective of their nature, relying upon that person's determination of the reasonableness, under the circumstances, of such a contract and that person's authority to make any contract which could be reasonable and was not conclusively known to be otherwise. This latter is true, especially where, as here, the person in possession affirmatively represents that he has such authority and the carrier has no positive knowledge to the contrary. *The Caledonia*, 50 Fed. (2d) 567. The contract so made determines the rights and duties of the carrier."

11. The Circuit Court of Appeals held that there was only one substantial issue in the case, saying (R. pp. 307-308):

> "The only substantial issue remaining in the case, as we view it, concerns the privilege of the Idefjord to agree with Stapledon & Son for on-deck carriage, in view of the outstanding Alexandria bills of lading."

The Circuit Court of Appeals proceeded to hold that the Idefjord had no such "privilege" on the ground that it had made the issuer of the Alexandria bills of lading its agent, and "could not then accept the goods under its own conditions" (R. p. 312).

12. Petitioner submits that the decision of the Circuit Court of Appeals for the Second Circuit in the case at bar is in direct conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *The St. Hubert*, 107 Fed. 727; certiorari denied by this Court, 181 U. S. 621.

13. In *The St. Hubert*, *supra*, goods had been shipped at Calcutta for delivery at Philadelphia with transshipment

at London, on the steamer of an independent auxiliary carrier, as in the case at bar. The question before the Court was whether this independent auxiliary carrier was bound by the bills of lading originally issued or was entitled to make its own contract with the initial carriers. The Circuit Court of Appeals for the Third Circuit held that an independent auxiliary carrier could be held liable only in accordance with its own contract and was not bound by the terms of the through bill of lading. The legal principle is thus stated by the Circuit Court of Appeals for the Third Circuit (107 Fed. at pp. 732-733):

> "In performing that service, however, it was necessary, and, as we have said, so understood by the parties to the contract, that a new and independent carrier from London to Philadelphia would have to be employed by the original carriers. The contract with such new carrier was a bilateral one, to which Cooper, Smith & Co. were not parties, though interested as consignees, to whom delivery was owing by the new carrier under the terms of its independent contract with the old carriers. Such new carrier was not in any way bound by the terms or stipulations of the through bills of lading, unless as they were expressly adopted by it as applicable to the particular service in which it was engaging.
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> * * * * * *
>
> "Another view of the situation of the parties from its legal standpoint is that one who contracts, on a through bill of lading, to carry goods from one port to another, is responsible to the owner or consignee for the entire service between the two ports, whether in his own ships or in those procured by him to enable or assist him to perform his contract. Such assistance from other and independent carriers may be necessary to the fulfillment of his undertaking under his through bill of lading. It is not required that he, or the independent auxiliary carrier, should invoke the authority of agency, express or implied, from the shipper or owners, to sanction such procurement; as it can be referred to the free choice of means open to the signers of the through bill of

lading, with which the shipper or consignee has no right to interfere. The latter may hold the through carrier to a strict fulfillment of his contract with them, but neither of them is on that account a party to such auxiliary contracts. In the exercise of this freedom of contract the engagement between the original and new carrier is, of course, subject to those duties and requirements which are imposed and exacted by the maritime law, but in all other respects the independent contract of the two carriers must be taken to govern the transportation service thereby undertaken. Its reasonable conditions and exemptions are as much a part thereof, and are as binding, as the main stipulation of carriage and affreightment. If the terms are more favorable to such new carrier than those contained in the through bill of lading, the owner, if he suffer thereby, must look for redress under that original contract. In the language of the court below:

> 'To say that the first bill of lading binds the second carrier is to require him to submit to a contract concerning which he was not consulted, and to which he did not agree.'"

14. The Circuit Court of Appeals for the Second Circuit refused to follow this well-settled rule, saying (R. p. 312):

> "And though it is claimed that the ship's liability in a suit in rem is measured by the contract of her master, and not by an antecedent agreement with third persons, not the agents of the ship, yet the Idefjord, by accepting the cargo for carriage with knowledge of the clean through bills, *made the issuer of those bills its agent. It could not then accept the goods under its own conditions,* and it was bound in rem for right delivery." (Italics ours.)

The above is in flat contradiction of the decision in *The St. Hubert, supra.*

Jurisdiction.

15. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925; 43 Stat. 938, Title 28, U. S. C., Sec. 347(a).

The opinion of the Circuit Court of Appeals is dated August 9, 1940 (R. p. 305). Within the time allowed by the Rules of the Circuit Court of Appeals a petition for rehearing was filed, which was denied on September 10, 1940 (R. p. 319), and on September 11, 1940, the order of reversal and for mandate of the Circuit Court of Appeals was filed (R. p. 320).

Question Presented.

16. The question presented is whether it was correctly decided in *The St. Hubert, supra,* that the vessel of an independent auxiliary carrier is not liable *in rem* for damage to cargo transshipped thereon, if exempted from liability by the contract under which the independent auxiliary carrier has received the goods, or whether, as held in the case at bar, an independent auxiliary carrier is not entitled to "accept the goods under its own conditions."

Reasons Relied on for the Allowance of the Writ.

17. Petitioner asks that this Court should issue its writ of certiorari and reverse the decision of the Circuit Court of Appeals and reinstate the decision of the District Court for the Southern District of New York for the following reasons:

(a) The decision of the Circuit Court of Appeals for the Second Circuit in the case at bar is in conflict with the decision of the Circuit Court of Appeals for the Third

Circuit, as mentioned *supra,* pages 5-7, and as will be pointed out more at length *infra,* pages 11-18. If the decision of the Court of Appeals for the Second Circuit in the case at bar stands, great confusion will result because that decision is not only at variance with the decision of the Circuit Court of Appeals for the Third Circuit in *The St. Hubert, supra,* but is also at variance with decisions in a number of other jurisdictions (pp. 14-16, *infra*). The outcome of litigation will thus depend upon the forum in which it is prosecuted.

(b) The decision sought to be reviewed involves a most important question of commercial law which ought to be ruled upon by this Court. In the development of maritime commerce, transshipment of cargo has become very common. The Circuit Court of Appeals in the case at bar holds that an independent auxiliary carrier may accept the goods only in accordance with the terms of the bill of lading initially issued. An independent auxiliary carrier therefore will, in many instances, be forced to refuse to on-carry because unable to comply with the conditions of the bill of lading initially issued. It is not in accord with the interests of commerce that goods should be delayed for indefinite periods at ports of transshipment, suffering deterioration and incurring charges, because no independent auxiliary carrier will accept them. The rule as stated in *The St. Hubert, supra,* page 5, offers a proper solution of the problem, but that rule is rejected by the Circuit Court of Appeals for the Second Circuit in the case at bar.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, directing that Court to certify and send to this Court, for review and determination, on a day certain to be named therein, a full and complete transcript of the record and proceedings

in this cause, which is numbered and entitled on the docket of the Circuit Court of Appeals as "No. 397, October Term, 1939, Blumenthal Import Corporation, Libelant-Appellant, against Steamship Idefjord, her engines, etc., Den Norske Amerikalinje A/S, Claimant-Appellee"; that the decree of the United States Circuit Court of Appeals for the Second Circuit in the said case may be reversed by this Honorable Court; and that your petitioner may have such other and further relief in the premises as may seem just.

DEN NORSKE AMERIKALINJE A/S,
By JOHN W. GRIFFIN,
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80 Broad Street,
New York, N. Y.

Supreme Court of the United States

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No.....

DEN NORSKE AMERIKALINJE A/S, as claimant of the steamship IDEFJORD, her engines, etc.,

Petitioner,

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BLUMENTHAL IMPORT CORPORATION,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The essential facts are stated in the petition. For a fuller statement the Court is referred to the findings of fact made by the District Court (R. pp. 282-288). See, too, the opinion of the Circuit Court of Appeals (R. pp. 306-308).

FIRST POINT

The decision below is in conflict with that of the Circuit Court of Appeals for the Third Circuit in *The St. Hubert*, 107 Fed. 727, certiorari denied 181 U. S. 621, and with many other well considered decisions.

1. *The decision in The St. Hubert.*

In *The St. Hubert, supra,* Stanley & Co. of Calcutta, acting as agents of Cooper, Smith & Co. of Philadelphia,

shipped to the latter sixty-five bales of goat skins in two lots, on board two steamers, the Palawan and the City of Sparta. The bills of lading issued at Calcutta by the owners of the two vessels are thus described by the Circuit Court of Appeals (107 Fed. at p. 728):

> "The bills of lading given by the owners of the Palawan and Sparta were through bills of lading from Calcutta to Philadelphia; that of the Palawan stating that the skins were to be carried via London, with a stipulation that 'the company are to be at liberty to carry the said goods to the port of their destination by the above or other steamer or steamers, ship or ships, either belonging to the company or to other persons.' The bill of lading for the skins shipped by the Sparta is also a through bill of lading from Calcutta to Philadelphia, but states that the ship is bound for London via Suez Canal, and that the goods are 'to be transshipped or landed at London, with liberty to warehouse there, and from London to be forwarded by steamer, at the risk of the shipper, but at ship's expense, and to be delivered subject to the exceptions and conditions at foot hereof.' It also has a general stipulation similar to that of the Palawan,—that the 'owners are to be at liberty to carry the said goods to their port of destination by the above or other steamer or steamers, ship or ships, either belonging to the owners or other persons, * * * and to transship * * * the goods, either on shore or afloat, and reship and forward the same, at owner's expense, but at merchant's risk.' Upon this bill of lading of the Sparta there is also the following note: 'The goods to be carried to Philadelphia, subject to the terms and conditions of local bills of lading issued by the agents of such steamer or steamers.'"

When the goods arrived at London they were transshipped on the steamship St. Hubert, to be carried from London to Philadelphia. The goods were received by the St. Hubert pursuant to the terms of its own bill of lading which contained a provision not in the bills of lading issued

at Calcutta providing that the shipowner was not to be liable:

> "* * * for any claim, notice of which is not given before the removal of the goods" (p. 729).

The St. Hubert reached Philadelphia in due course and the goods were delivered to Cooper, Smith & Co., who did not give notice of claim before they removed the goods. A suit to recover for the damage sustained by the goods was later brought *in rem* against the St. Hubert. The Circuit Court of Appeals for the Third Circuit held that the St. Hubert could be made liable only in accordance with the contract under which it had accepted the goods and that the failure to give notice of claim before the goods were removed barred the suit. In addition to the extracts from the opinion quoted *supra*, pages 6, 7, the Circuit Court of Appeals for the Third Circuit further said (p. 732):

> "The new carrier receipted for the goods from the old, and delivered to them its bills of lading, which were the measure of its responsibility, and the terms of which were binding upon it, as an obligation of its own contract freely entered into. There is in these bills of lading a single reference to the through bills of lading issued by the owners of the Palawan and Sparta, in Calcutta, and that is the convenient and usual one in cases of transshipment that the delivery of the goods is to be made to the party or parties who appear to be consignees of the through bills of lading, properly indorsed. But this is an express term and stipulation of the particular bills of lading issued by the new carrier. The terms upon which the service was to be performed depended upon the consent of the new carrier as embodied in the agreement of its bills of lading. It assumed no duty or obligation towards the consignees, other than as stated and limited therein. The original carriers were obliged to make the best bargain they could for the continuance of the carriage service they had undertaken for the owners and consignees."

In concluding its opinion the Circuit Court of Appeals for the Third Circuit further stated (p. 733):

> "The liability of the last carrier to the owners of the goods it had undertaken to carry, whether that liability rested on contract or in tort, must be taken to be limited by the express stipulation contained in its individual contract of service."

The Circuit Court of Appeals for the Third Circuit further pointed out that a provision in the bill of lading for the Sparta, that the goods were to be carried "subject to the terms and conditions of local bills of lading," removed "all ground for controversy as to the 25 bales of skins received from that ship" (p. 733). While the bill of lading of the Palawan contained no such provision, the Circuit Court of Appeals held that the same rule applied.

2. *Other decisions in accord with the St. Hubert.*

In *Crossan* v. *New York & New England R. R. Co.*, 149 Mass. 196 (1889), the defendant, an independent auxiliary carrier, had notice from the way-bill that freight had been fully prepaid to the initial carrier. Nevertheless it received a shipment of horses and transported them to destination, where it refused to deliver them unless paid the freight due on its own line. The owner of the horses brought suit for conversion, arguing that the initial carrier was a special agent and that the defendant had notice that the initial carrier had no authority to create an additional charge on the goods. In deciding in favor of the defendant, Mr. Justice Holmes, at that time on the Massachusetts bench, said (pp. 198-199):

> "An unforeseen case had arisen, and the defendant was called on by the plaintiff's forwarding agent to act at once in some way. * * * The plaintiff was not present, and it might take time and cost money to communicate with him; the horses were perishable, and their keep would probably have cost more than the unpaid freight if they had been delayed;

> although we do not now decide whether these last facts make a difference in the law.
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> "If the effect of the plaintiff's instructions were doubtful, the law would give the defendant the benefit of the interpretation adopted by it in good faith (*Ireland* v. *Livingston*, L. R. 5 H. L. 395, 416), and would consider the necessity of an immediate decision. *Hawks* v. *Locke*, 139 Mass. 205, 209."

In concluding the opinion on this point Mr. Justice Holmes said (p. 199):

> "It is to be observed that the principle that no man's property can be taken from him without his consent, express or implied, has not prevented the last of a line of carriers from maintaining its lien when the first carrier has forwarded the goods to a wrong place. *Briggs* v. *Boston & Lowell Railroad*, 6 Allen 246, distinguishing *Robinson* v. *Baker*, 5 Cush. 137. *Whitney* v. *Beckford*, 105 Mass. 267. *Patten* v. *Union Pacific Railway*, 29 Fed. Rep. 598, disapproving *Fitch* v. *Newberry*, 1 Doug. (Mich.) 1; *Vaughan* v. *Providence & Worcester Railroad*, 13 R. I. 578. Yet in that case the last carrier might be said to have notice that the forwarding agent's authority was limited to sending the goods to the place directed by the shipper."

In addition to the authorities cited in the preceding paragraph, reference may be made to Volume 13, C. J. S., p. 913; *Crane* v. *Tooker Storage & Forwarding Co.*, 204 Ill. App. 354; *Hall Corp.* v. *Cargo ex s/s Mont Louis*, 62 Fed. (2d) 603, 605 (C. C. A. 2), and the numerous decisions holding that the owner of goods is bound by a contract of carriage restricting the carrier's liability, although the agent was without authority to enter into such a contract and that lack of authority was ascertainable by the carrier.

Reid v. *Fargo*, 241 U. S. 544;
Nelson v. *Hudson River R. R. Co.*, 48 N. Y. 498;
Miller v. *Harvey*, 221 N. Y. 54, 57, per Mr. Justice Cardozo.

The Cayo Mambi, 1 Fed. Supp. 118, aff'd 62 Fed. (2d) 791 (C. C. A. 2), also follows *The St. Hubert, supra,* and supports the petitioner. In that case the bill of lading issued by the initial carrier fixed the value of the packages received at not to exceed £100 per package. Transshipment was effected at New York, the bill of lading of the independent auxiliary carrier restricting the amount recoverable to $100 per package. The goods were damaged while in the possession of the independent auxiliary carrier, which thereupon paid the goods owner the amount of the claim up to $100 per package. The goods owner was held entitled to recover from the initial carrier the balance of damages outstanding, on the theory that the initial carrier had by the forwarding contract restricted the claim of the goods owner against the independent auxiliary carrier, and that this restriction was valid insofar as the independent auxiliary carrier was concerned.

3. *The decision of the Circuit Court of Appeals in the case at bar.*

The Idefjord, an "independent auxiliary carrier," was free to accept the goods on its own conditions, if we assume, as we should, that *The St. Hubert, supra,* was correctly decided.

The Circuit Court of Appeals for the Second Circuit, however, denied the validity of that fundamental proposition, saying (R., bottom of p. 312):

> "* * * the Idefjord, by accepting the cargo for carriage with knowledge of the clean through bills, made the issuer of those bills its agent. It could not then accept the goods under its own conditions * * *."

If the Idefjord "made the issuer of those (Alexandria) bills of lading its agent," it could not escape liability in the present suit; by parity of reasoning, the St. Hubert made the issuer of the Calcutta bills of lading its agent, and that case was wrongly decided.

The above surprising proposition of the Circuit Court of Appeals for the Second Circuit is contrary to other authorities. In *Scrutton on Charter Parties and Bills of Lading,* 14th Ed. (1939), the legal principle is stated as follows (p. 84):

> "*Semble,* that the companies other than the company which signs and delivers the bill of lading, are not liable and cannot sue on the contract of carriage contained in such bill of lading, unless the signing company had authority to act in their behalf, or its action was afterwards ratified by them."

In the case at bar D. C. Pitellos & Co., who signed the Alexandria bills of lading, had no authority to act on behalf of the Idefjord. Nor were the Alexandria bills of lading ratified by or on behalf of the Idefjord, which accepted the goods under and subject to its own terms and conditions.

There are some subsidiary points in the opinion of the Circuit Court of Appeals which may be briefly referred to:

It is said (R. p. 311) that there is no provision in the Alexandria bills of lading which authorized shipment on deck from Port Said. The Alexandria bills of lading, however, provided, as quoted by the Circuit Court of Appeals (R. p. 310), that the goods were to be transshipped "subject to the conditions and exceptions of the carrying conveyance."

It was a necessary condition that the goods should be carried for a part of the way on deck, because there was no room below deck. It was unnecessary that the Alexandria bills of lading specify in detail all the conditions that an independent auxiliary carrier might have to insist upon.

Moreover, these Alexandria bills of lading gave the carrier the liberty "to deviate" (par. 1 of bills of lading, inserted between pages 224 and 233 of the record). The right to deviate includes the right to carry goods on deck. *G. W. Sheldon & Co.* v. *Hamburg American Line,* 28 Fed. (2d) 249, 251 (C. C. A. 3).

The Alexandria bills of lading, so called, did not provide for carriage on the ships named therein beyond Port Said. From Port Said on they were not in a true sense bills of lading, but merely contracts of D. C. Pitellos & Co. to effect transshipment. Any person receiving them did so charged with knowledge of these infirmities, patent on their face, including the provision therein that the goods would be transshipped "subject to the conditions and exceptions of the carrying conveyance."

Indeed, the provisions of the Alexandria bills of lading on this subject appear unnecessary. In *The St. Hubert, supra,* the bills of lading issued by the Palawan at Calcutta contained no provision that transshipment would be subject to the terms of the independent auxiliary carrier. Nevertheless the Court held that the clause in the bill of lading of the independent auxiliary carrier, requiring that notice of claim be given before removal of the goods, required the dismissal of the suit.

Petitioner does not assert that there may not be liability on the part of D. C. Pitellos & Co., who was bound by the provisions of the Alexandria bills of lading, and takes no position on that subject.

The decision of the Circuit Court of Appeals is based on two fallacious premises: (1) that the Alexandria bills of lading forbade carriage on deck by an independent auxiliary carrier, even for a minor part of the journey; (2) that the master of the Idefjord was affected with constructive knowledge of the Alexandria bills of lading, the originals of which he never saw, being handed copies, along with a bundle of other documents, as the Idefjord left Port Said (R. pp. 91-92).

It is claimed that the master should have scrutinized what purported to be *copies* of the Alexandria bills of lading, in which event he might at least have had a doubt as to whether he could accept the bales for on-deck shipment. There are many answers to the foregoing. The master was assured on all sides that on-deck carriage had been

agreed to (R. pp. 284, 285, 287). He was entitled to assume that as consent had been obtained from the shippers, the shippers had duly communicated with any other parties interested. The law did not require the master to make an exhaustive legal investigation before the goods were accepted. *Reid* v. *Fargo* and *Nelson* v. *Hudson River R. R. Co., supra,* p. 15.

As was pointed out by Mr. Justice Holmes in *Crossan* v. *N. Y. & New England R. R. Co.* (*supra,* p. 15), if the master's instructions were not clear the law would give him the benefit of a *bona fide* interpretation which he might put upon them and would consider the necessity of an immediate decision.

In the case at bar the suit is solely *in rem* against the ship. The only undertaking on the part of the master was to carry the bales on deck. Antecedent undertakings by other persons not the agents of the ship do not create any right *in rem,* which is a secret lien "*stricti juris*" and not to be extended by "construction, analogy or inference." *Osaka Shosen Kaisha* v. *Pacific Lumber Co.,* 260 U. S. 490, 499; *The Seven Brothers No. 1,* 203 Fed. 21 (C. C. A. 2); *The Owego,* 270 Fed. 967 (C. C. A. 2); *The Saturnus,* 250 Fed. 407 (C. C. A. 2); *The Blandon,* 287 Fed. 722 (D. C., S. D. N. Y.); *The Devona,* 272 Fed. 275 (D. C., E. D. N. Y.).

The Circuit Court of Appeals for the Second Circuit states that *The St. Hubert, supra,* and *Crossan* v. *N. Y. & New England R. Co., supra,* should be "limited to their facts" (R. p. 309). In *The St. Hubert* the goods were shipped by Stanley & Co. to Cooper, Smith & Co. Neither of these parties ever gave any consent to the goods being reshipped at London under a restricted liability. In the case at bar the sales contract between Zariffa and the respondent herein was on a C. & F. basis so that Zariffa was the respondent's agent in making the shipment. The situation is wholly parallel to that in *The St. Hubert, supra,* except that the position of the respondent in the case at bar is weakened by the fact that Zariffa agreed that the goods should be shipped on deck (R. p. 286).

This was not a "harsh, arbitrary" condition as incorrectly said by the Circuit Court of Appeals (R. p. 311), but was, on the contrary, the course deemed best by the respondent's agent and all of the other parties concerned, including D. C. Pitellos & Co., Stapledon & Son and Port Said & Suez Coal Co.

In further discussing the cases and in attempting to distinguish *The St. Hubert, supra,* the Circuit Court of Appeals for the Second Circuit said (R. p. 312): "In none of those cases was the variation one which could work harm upon an innocent third party."

In *The St. Hubert, supra,* the "variation" was a provision in the bill of lading of the independent auxiliary carrier that there should be no liability on its part for any claim, notice of which was not given before the removal of the goods. As the bill of lading of the independent auxiliary carrier was not issued to the consignee of the goods, this provision was unknown to the consignee. Nevertheless, failure to give the notice resulted in dismissal of the suit. In that case the "variation" was one "which could work harm upon an innocent third party."

SECOND POINT

Discussion of cases cited by the Circuit Court of Appeals other than those already commented upon.

The T. A. Goddard (D. C., S. D. N. Y.), 12 Fed. 174, cited R. p. 308. In that case tea was shipped at Foochow, China, on the steamer Orestes, the bill of lading providing for transshipment at Hong Kong on the T. A. Goddard. The tea was loaded on the T. A. Goddard at Hong Kong alongside of some camphor, the odor of which permeated the tea and damaged it. Russell & Co. were the charterers of the T. A. Goddard, and it was claimed by the ship, when sued for damage to the tea, that no recovery could be had because Russell & Co. had sanctioned the stowage. The

ship was held liable on the ground that the master was negligent in stowing the camphor in proximity to the tea and that the concurrence of Russell & Co. was not a defense.

The facts of the case are so different from those in the case at bar that it can hardly be said to be a precedent for either side. But if it may be relied on, it supports the position of the petitioner, the Court saying (p. 181):

> "The libellants, having no direct agreement with the master of the T. A. Goddard, are doubtless limited in their recovery by the lawful terms of the contract between Russell & Co. and the bark, as laid down in the case of the *N. J. St. Nav. Co.* v. *Merchants' Bank,* 6 How. 344."

The above is the position of petitioner in the case at bar.

Bank of California v. *International Mercantile Marine Co.,* 64 Fed. (2d) 97; *The Hibernian,* L. R. [1907] P. 277; *Scrutton on Charter Parties and Bills of Lading,* 14th Ed., 1939, p. 84, cited R. p. 310, hold that the bill of lading issued by the initial carrier may validly incorporate by reference the bill of lading of the independent auxiliary carrier. These decisions lend no support to the conclusion of the Circuit Court of Appeals in the case at bar.

Pacific Rice Mills v. *Westfeldt Bros.,* 31 Fed. (2d) 979, and other cases cited at the bottom of R. p. 310, hold merely that a provision in a contract in handwriting or typewriting is to be preferred to a provision in print, if the provisions are inconsistent. However, it is equally well settled that a provision in typewriting or handwriting does not supersede a provision in print unless inconsistency in fact exists.

The Delaware, 14 Wall. 579; *St. Johns, N. F. Shipping Corp.* v. *S. A. Companhia, etc.,* 263 U. S. 119; *The Gran Canaria* (D. C., S. D. N. Y.), 16 Fed. 868, and *The Kirkhill,* 99 Fed. 575 (C. C. A. 4), cited R. p. 311, hold, generally, that if the master issues a clean bill of lading, the goods cannot lawfully be carried on the ship's deck. In the case

at bar the goods were accepted by the Idefjord under the stipulation that they were to be carried on the ship's deck, and the master of the Idefjord did not issue any clean bill of lading (*supra*, p. 3). The decisions referred to are consequently not in point.

Hansson v. *Hamel & Horley*, L. R. [1922] 2 A.C. 36, and *Harper* v. *Hochstim*, 278 Fed. 102, cited R. p. 312, are cases relating to the sales of goods, and seem to have no bearing on the carrier's liability.

In *The Sprott* (D. C., S. D. N. Y.), 70 Fed. 37, cited by the Circuit Court of Appeals, R. p. 312, the charterers, acting in the immediate presence of the master and as his amanuenses, signed, as his agents, clean bills of lading for the shipment involved. Later this shipment was stowed on the ship's deck and sustained damage. For obvious reasons the ship was held liable in a suit *in rem;* the fact that *after* the bills of lading referred to had been issued the master signed another so-called general bill of lading in favor of the charterers, who were not the shippers of the goods, which bore an on-deck clause, was obviously immaterial.

The Poznan, (D. C., S. D. N. Y.), 276 Fed. 48, cited by the Circuit Court of Appeals, R. p. 312, does not involve any question of transshipment or on-deck carriage. There the charterer, under a provision of the charter party, signed bills of lading, and it was held that these bills of lading became binding on the ship as soon as the goods were laden on board. No other bills of lading were issued by anyone.

In the case at bar the contract of carriage of the Idefjord was made at Port Said and provided for on-deck carriage. The bills of lading issued at Alexandria did not purport to bind the Idefjord.

THIRD POINT

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 524.

DEN NORSKE AMERIKALINJE A/S, as claimant of the steamship IDEFJORD, her engines, etc.,

Petitioner,

against

BLUMENTHAL IMPORT CORPORATION,

Respondent.

REPLY BRIEF FOR PETITIONER SUBMITTED IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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OTHER AUTHORITIES CITED

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REPLY BRIEF FOR PETITIONER SUBMITTED IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Comment upon the brief submitted on behalf of the respondent would not be required were it not felt necessary to call attention to certain incorrect statements therein.

I

At page 2, respondent states that the Circuit Court of Appeals did not accept the District Court's findings of fact.

In *Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, 114 F. (2d) 248 (C. C. A. 2), the Circuit Court of Appeals held that findings of fact by the District Court in Admiralty were entitled to the same measure of conclusiveness as provided for in Rule 52(a) of the Rules of

Civil Procedure, which rule provides that in all actions tried upon the facts without a jury "findings of fact shall not be set aside unless clearly erroneous * * *" (114 F. [2d] at p. 250).

The Circuit Court of Appeals did not suggest or intimate that any finding of the District Court in the case at bar was "clearly erroneous" or in anywise incorrect. It differed from that Court with respect to legal principles. In explanation of the grounds on which the result was reached, the Circuit Court of Appeals summarized the findings of the District Court, but did not purport to set any of them aside or to make any new findings of fact of its own.

II

Respondent's brief makes some comment upon the five so-called bills of lading issued by Pitellos & Co. at Alexandria. These documents acknowledged receipt of shipments of wool on board various vessels to be carried to Port Said and there to be transshipped by Pitellos & Co. on some other vessel to the United States. In so far as the transit from Port Said to United States was concerned, these anomalous documents merely evidenced a personal undertaking to transship on the part of Pitellos & Co.

A bill of lading is thus defined in the well-known treatise on Charter Parties and Bills of Lading by the late Sir Thomas Edward Scrutton, 14th Edition, at page 9:

> "A bill of lading is a receipt for goods shipped on board a ship, signed by the person who contracts to carry them, or his agent, and stating the terms on which the goods were delivered to and received by the ship."

The so-called bills of lading on which respondent's case is based could properly be so described as regards the transit from Alexandria to Port Said, but from Port Said to the United States these documents merely evidenced

contracts between the shippers and Pitellos & Co., by which Pitellos & Co. agreed to effect transshipment on an independent auxiliary carrier. For further definition of a "bill of lading" see *Diamond Alkali Export Corp.* v. *Fl. Bourgeois,* L. R. (1921), 3 K. B. D. 443.

III

With reference to respondent's criticism of the statement in the petition that, when the wool arrived at Port Said no underdeck space was available for several months (Petition, p. 2, par. 5), the District Court found specifically (R., p. 283) that, when the merchandise arrived at Port Said, concern developed "at the prospect of a failure of ships to carry the goods below deck in the then near future" (R., p. 283); and further stated (R., p. 293), "there was the uncertainty of obtaining another ship to carry the wool." The only evidence as to the time during which the wool would have been required to remain at Port Said before underdeck space would become available is that several months would have elapsed (R., pp. 60-61), which reference is given in the petition.

IV

Page 3 of respondent's brief criticizes the statement in paragraph 7 of the petition that the contract under which the Idefjord received the bales was evidenced by the letters of Stapledon & Sons, the Port Said & Suez Coal Company, the Idefjord manifest, the mate's receipts and the bills of lading made out by the Port Said & Suez Coal Company. This finding was certainly made by the District Court (R., pp. 284-285) and, as a finding of fact, was not disputed by the Circuit Court of Appeals, which, however, erroneously decided that the contract was legally invalid.

V

Respondent cites at page 4 *The Delaware,* 14 Wall. 579, and *St. Johns N. F. Shipping Corp.* v. *S. A. Companhia Geral Commercial,* 263 U. S. 119. These cases hold, as pointed out in the brief annexed to the petition (pp. 21-22), that, if the master issues a clean bill of lading the goods cannot lawfully be carried on the ship's deck. In the case at bar the master of the Idefjord, an independent auxiliary carrier, did not issue any clean bill of lading, but, on the contrary, accepted the goods under a contract which provided for "on-deck" carriage.

VI

Respondent, in referring to *The St. Hubert,* 107 Fed. 727 (C. C. A. 3), cert. den. 181 U. S. 621, stresses minute differences in facts, but fails to distinguish the rule on which that decision was based, which is thus stated (p. 732):

> "Such new carrier was not in any way bound by the terms and stipulations of the through bills of lading, unless as they were expressly adopted by it as applicable to the particular service in which it was engaging."

Our law is not a wilderness of special instances, but consists of "principles which govern specific and individual cases as they happen to arise" (Mansfield, C. J., in *R.* v. *Bembridge,* Howell's State Trials, XXII, 155). The rule laid down in *The St. Hubert, supra,* and the decision in the case at bar are in direct conflict.

Respondent also asserts (Brief, p. 5) that, if the Idefjord were exonerated in this suit *in rem,* "no protection can be afforded to banks and merchants who are accustomed to relying upon such arrangements for financing imports."

In the case at bar respondent, if it relied upon the so-called bills of lading of Pitellos & Co. which were ultimately transferred to it, would be entitled to require Pitellos & Co. to justify its conduct in connection with the transshipment

and to pay damages if that conduct were improper. Banks and consignees are entitled, in any proper case, to a claim against the contracting carrier, but, as decided in *The St. Hubert, supra,* not against an independent auxiliary carrier which has performed the contract under which it received the goods.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1940.

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DEN NORSKE AMERIKALINJE A/S, as claimant of the steamship "IDEFJORD", her engines, etc.,

Petitioner,

—against—

BLUMENTHAL IMPORT CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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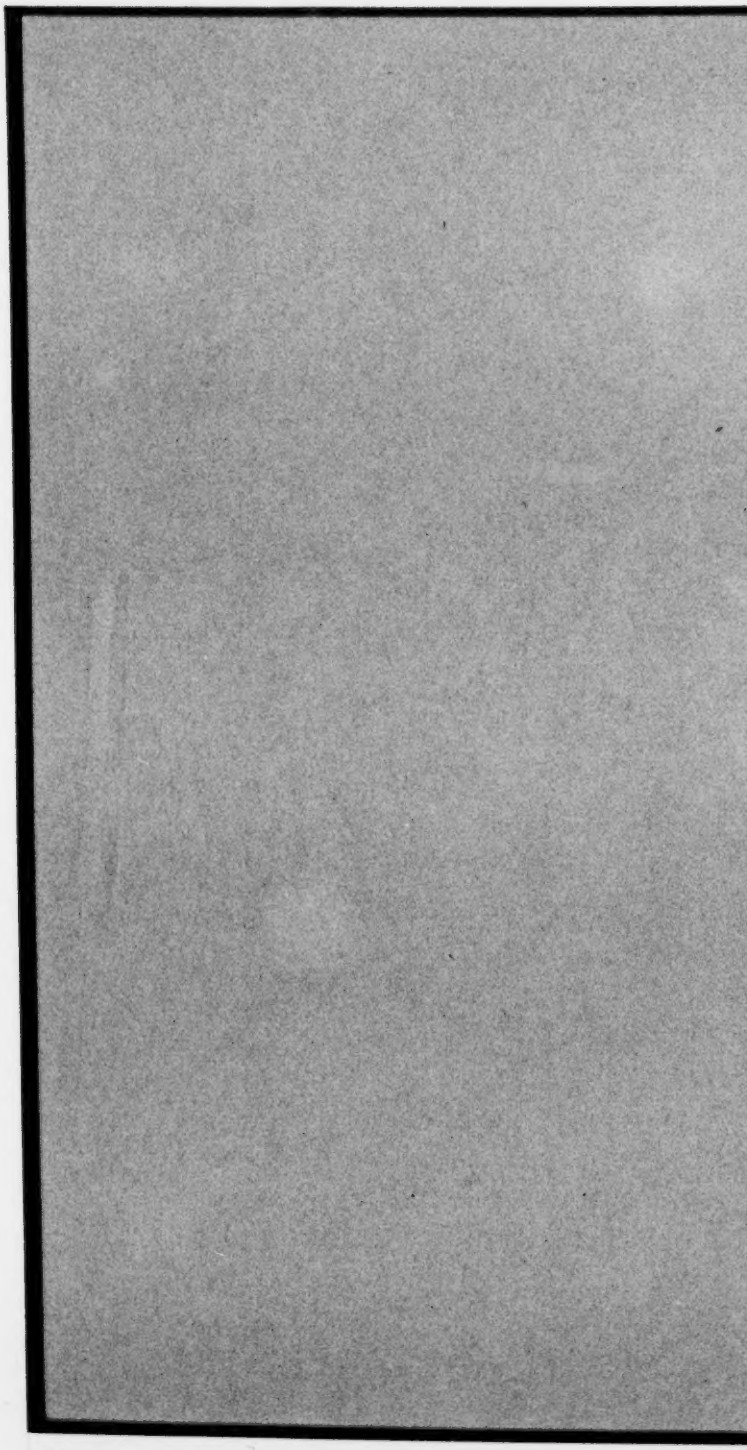

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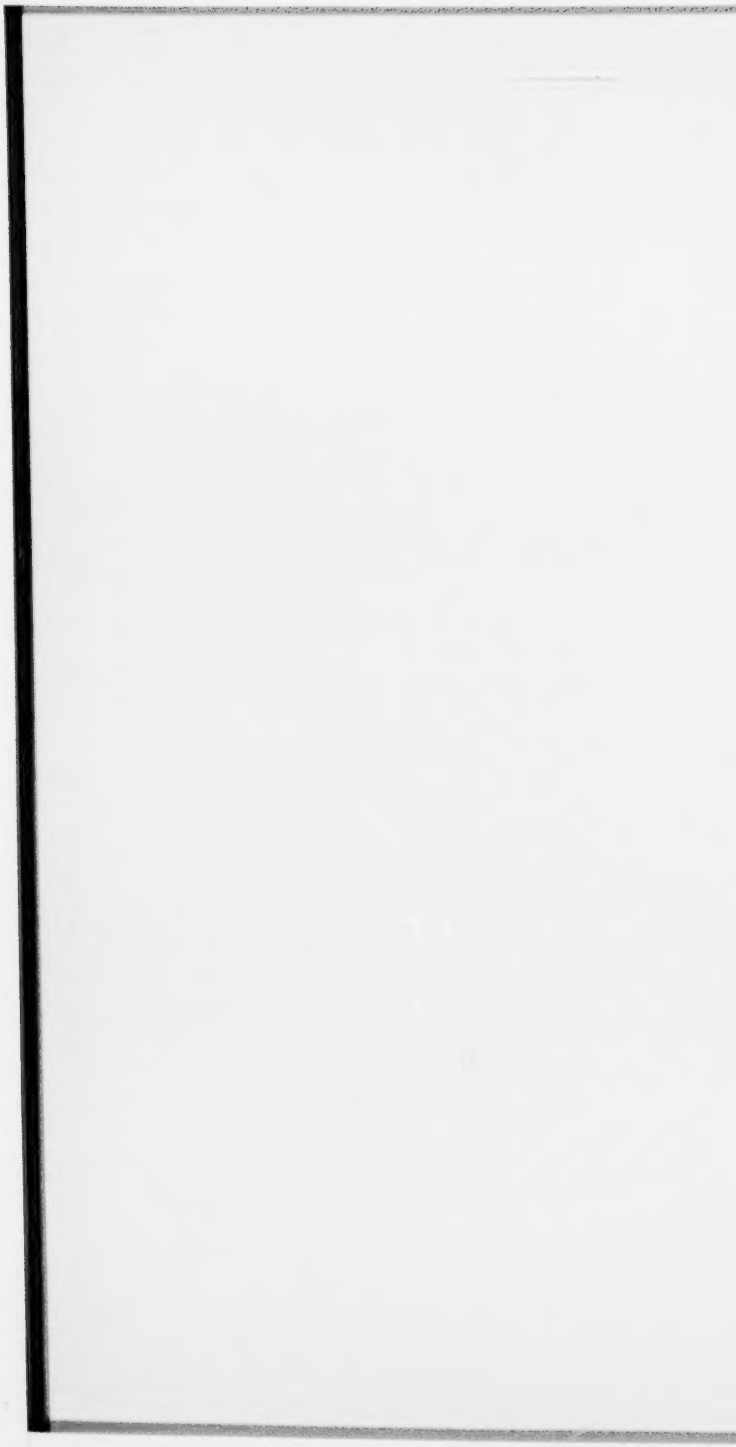

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I.

The Opinions Below.

The opinion of the District Court (R., pp. 282-293) was filed on December 22, 1939, and is reported in 31 F. Supp. 667.

The opinion of the Circuit Court of Appeals for the Second Circuit was filed on August 9, 1940 (R., pp. 305-312) and is reported in 114 F. (2d) 262.

II.

Statement of Case.

The petition contains many misstatements and omissions, some of which must be corrected in order to present a fair statement of the case.

In paragraph 2, on page 2, the statement that all the District Court's findings of fact were accepted by the Circuit Court of Appeals is untrue. The Circuit Court made their own findings except (R., p. 307) that they saw no reason to disturb the District Court's finding that the damage was due solely to the on-deck carriage and they accepted the lower court's conclusion that the "Idefjord" and her crew were otherwise free from negligence.

In paragraph 4, page 2, the misleading statement is made that Pitellos & Co. issued five "so-called" bills of lading. While counsel for the shipowners may characterize these bills of lading as "so-called", the documents themselves were given full weight and accorded full dignity by the Circuit Court of Appeals, which found that (R., p. 306):

> "Pitellos & Co. issued five similar negotiable bills of lading stating that varying numbers of bales of wool had been shipped in apparent good order at Alexandria for delivery in New York and Philadelphia to libellant's bankers or their assigns as consignees."

It was stipulated at the trial (R., p. 10) that these negotiable bills of lading (which petitioner disparages) covered the shipments of wool involved in this litigation; that they were presented at destination (New York) to the "Idefjord's" agents (Phelps Bros. & Co.) and that customs entries were made on the basis of these bills of lading. These are also the bills of lading which were negotiated through the banks (R., pp. 39-49).

Paragraph 5, page 2 (which according to paragraph 2 contains a fact found by both Courts below), states that after the wool had moved from Alexandria to Port Said, no under-deck space was available on any steamer for

several months. No such finding of fact was made by the District Court or by the Circuit Court of Appeals.

In paragraph 7 (which according to paragraph 2 contains a fact found by both Courts below) the statement is made that the contract under which the "Idefjord" received the bills of lading was evidenced by letters of Stapledon & Sons and Port Said & Suez Coal Co., the ship's manifest, the mate's receipts and the bills of lading. Not only was this not a fact found by the Circuit Court of Appeals, but it is squarely contradicted by the decision of that Court.

The facts are fully and fairly stated in the opinion of the Circuit Court of Appeals to which respondent respectfully refers.

III.

The Question Presented.

It is respectfully submitted that the question presented is not whether *The St. Hubert* was correctly decided, but whether a contract for on-deck carriage at shippers' risk of a valuable cargo susceptible to water damage, such as wool, was a reasonable one where negotiable bills of lading were outstanding calling for carriage in the usual manner, namely in the cargo compartments of the vessel below deck.

IV.

Reasons for Denying the Petition.

There is no conflict between the decision of the Circuit Court of Appeals for this Circuit and the decision of the Circuit Court of Appeals for the Third Circuit in *The*

St. Hubert, 107 Fed. 727, as respondent shall hereinafter show.

There is no important question of commercial law involved in this appeal. This petition is simply an attempt to persuade this Court to reverse its own holdings in cases which have been accepted for years by the commercial community as stating the settled law.

In *The Delaware*, 14 Wall. 579, and more than 50 years later in *St. Johns N. F. Shipping Corp.* v. *S. A. Companhia Geral Commercial*, 263 U. S. 119, this Court held that a carrier cannot carry on deck goods shipped under a clean bill of lading. There is no reason why this unequivocal and well known rule of long standing should be violated in favor of an on-carrying vessel at a transshipment port whose captain received and had on board copies of the outstanding negotiable clean bills of lading calling for delivery to the order of a third party who did not consent to the on-deck carriage.

Argument.

FIRST POINT.

There is no conflict between the decision in *St. Hubert* and the decision in this case.

What *The St. Hubert* decided, and all it decided, was that a consignee in a transshipment case is bound by the usual bill of lading clause requiring notice of claim for damage to be presented before merchandise is removed from the pier. In that case it does not appear whether the through bills of lading were negotiable, and moreover a second bill of lading was actually issued and delivered by the on-carrier.

In the instant case, the Circuit Court of Appeals held that the Alexandria through bills of lading were negotiable and upon their presentation, with drafts, to the London banks would be honored by the latter; that this was not an unusual or unreasonable course of business; that the "Idefjord" having notice of the circumstances and terms of these bills of lading knew that commercial drafts were being or might be honored in reliance on the normal conditions of carriage, set forth therein; that the "Idefjord" therefore was not free to arrange carriage of the cargo in substantial disregard of the original agreement; that the authority of Stapledon & Sons was unknown to the "Idefjord" and is still unknown to the courts who have passed on this litigation; that even if Stapledon & Sons were authorized by the shipper to contract for on-deck carriage, the "Idefjord" was on notice from the terms of the negotiable bills of lading that the shipper was not the consignee and, therefore, might not and probably did not possess valid authority to bind whoever might be the holder of the negotiable through bills of lading; and that unless a duty on the part of the on-carrying steamer to comply with the through bills of lading be recognized, no protection can be afforded to banks and merchants who are accustomed to rely upon such arrangements for financing imports.

The St. Hubert, Crossan v. *New York & N. E. R. Co.*, 149 Mass. 196, and other cases relied on by petitioner, were considered, discussed and clearly distinguished by the Circuit Court of Appeals (R., pp. 309, 311, 312) which stated (R., p. 312):

> "The variations in the decisions above cited were either of the sort ordinarily to be expected in different bills of lading or eminently reasonable under the situation confronting the on-carrying conveyance."

LAST POINT.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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